

ESTTA Tracking number: **ESTTA626161**

Filing date: **09/09/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91202984
Party	Plaintiff Hachette Filipacchi Presse
Correspondence Address	SUSAN UPTON DOUGLASS FROSS ZELNICK LEHRMAN & ZISSU PC 866 UNITED NATIONS PLAZA NEW YORK, NY 10017 UNITED STATES mc@fzlz.com, sdouglass@frosszelnick.com, bsolomon@frosszelnick.com
Submission	Other Motions/Papers
Filer's Name	Gary H. Fechter
Filer's e-mail	gfechter@mccarter.com, lshyavitz@mccarter.com, ihurtado@mccarter.com, kgarrone@mccarter.com, apang@mccarter.com, dlynch@mccarter.com
Signature	/ghf/
Date	09/09/2014
Attachments	Motion to Re-open Testimony Periods.pdf(110554 bytes) Opposer's Brief in Support of Motion to Re-Open Testimony Periods.pdf(232729 bytes) Declaration of Gary H. Fechter.pdf(215793 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85/240,605
Filed on February 2, 2011
Published in the Official Gazette on June 21, 2011
Mark: ELLE SCHNEIDER

Hachette Filipacchi Presse,

Opposer,

-v-

Lauren R. Schneider,

Applicant.

x

Opposition No. 91202984

**MOTION TO RE-OPEN
TESTIMONY PERIODS**

x

Opposer Hachette Filipacchi Presse ("Hachette") hereby requests, pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, that the testimony periods be reopened for a period of thirty (30) days, and that the Board thereafter permit the parties to submit supplemental trial briefs, incorporating evidence made of record during the re-opened testimony periods. The additional time is not requested for purposes of delay.

In support of this application, Hachette relies upon the accompanying Brief and Declaration of Gary H. Fechter.

Dated: September 9, 2014

McCARTER & ENGLISH, LLP

By: 

Gary H. Fechter

Lori Shyavitz

245 Park Avenue, 27th Floor
New York, New York 10167
Phone: (212) 609-6800
Fax: (212) 609-6921

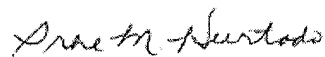
*Attorneys for Opposer
Hachette Filipacchi Presse*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion to Re-open Testimony Periods, together with the supporting Brief and Declaration of Gary H. Fecther, have been served by overnight mail and electronic mail on Applicant, Lauren R. Schneider, at the following address for Applicant:

Lauren R. Schneider
465 North Summit Avenue
Pasadena, CA 91103-3719
elle.schneider@gmail.com, elle@attentionsoldier.com

Date: September 9, 2014



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85/240,605
Filed on February 2, 2011
Published in the Official Gazette on June 21, 2011
Mark: ELLE SCHNEIDER

Hachette Filipacchi Presse,

Opposer,

Opposition No. 91202984

-v-

Lauren R. Schneider,

Applicant.

**OPPOSER'S BRIEF IN SUPPORT OF
MOTION TO RE-OPEN TESTIMONY PERIODS**

McCARTER & ENGLISH, LLP
Gary H. Fechter
Lori Shyavitz
245 Park Avenue, 27th Floor
New York, New York 10167
Phone: (212) 609-6800
Fax: (212) 609-6921

*Attorneys for Opposer
Hachette Filipacchi Presse*

Opposer Hachette Filipacchi Presse (“Hachette”) submits this Brief in support of Hachette’s Motion to Re-open the Testimony Periods pursuant to Rule 6(b) of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND

On September 4, 2014, the law firm of McCarter & English, LLP (“McCarter”) was retained to represent Hachette in connection with the above-referenced opposition. (Declaration of Gary H. Fechter (“Fechter Dec.”), ¶ 2). On that same date, McCarter filed a Notice of Appearance as counsel for Hachette in the opposition. (*Id.*).

Immediately thereafter, McCarter reviewed the docket in connection with the preparation of Hachette’s trial brief, which Hachette filed with the Board on September 8, 2014. (Fechter Dec., ¶ 4). Upon review of the docket, specifically the Notice of Reliance and Notice of Filing of Testimony Deposition filed on behalf of Hachette, as well as the registrations owned by Hachette that were pleaded in the Notice of Opposition, McCarter discovered that numerous pieces of critical evidence that support Hachette’s likelihood of confusion and dilution claims were not made part of the record. (*Id.*).

In an effort to minimize the prejudice to Hachette, McCarter attached two appendices to Hachette’s Opening Brief (“Hachette’s Brief”). (Fechter Dec., ¶ 6). Appendix A to Hachette’s Brief identifies a number of registrations for ELLE-formative marks that are owned by Hachette, but which were not pleaded in the Notice of Opposition or otherwise made of record. Appendix B includes certain documents produced by Applicant during discovery in this proceeding. (*Id.*).

ARGUMENT

Hachette respectfully requests that the testimony periods be re-opened to permit Hachette to: (1) make the registrations included in Appendix A part of the record in this proceeding; and

(2) take the steps necessary to make the documents included in Appendix B part of the record in this proceeding. Hachette further requests that the Board permit the parties to submit supplemental trial briefing addressing any additional evidence submitted during the testimony periods. Hachette seeks to reopen the testimony periods in this proceeding to submit critical evidence to support its claims.

Applicant will not be prejudiced if the testimony periods are reopened. Hachette's Motion requests that both parties' testimony periods be re-opened and that both parties be permitted to supplement their trial briefing. Therefore, to the extent that any additional evidence will be made part of the record, Applicant will have a full and fair opportunity to address it.

CONCLUSION

For the foregoing reasons, Hachette respectfully requests that the Board reopen the testimony period on this proceeding and thereafter permit the parties to submit supplemental trial briefing.

Dated: September 9, 2014

McCARTER & ENGLISH, LLP

By: 

Gary H. Fechter

Lori Shyavitz

245 Park Avenue, 27th Floor

New York, New York 10167

Phone: (212) 609-6800

Fax: (212) 609-6921

Attorneys for Opposer

Hachette Filipacchi Presse

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 85/240,605
Filed on February 2, 2011
Published in the Official Gazette on June 21, 2011
Mark: ELLE SCHNEIDER

Hachette Filipacchi Presse,

Opposer,

-v-

Lauren R. Schneider,

Applicant.

Opposition No. 91202984
**DECLARATION OF
GARY H. FECHTER**

GARY H. FECHTER, declares pursuant to 28 U.S.C. § 1746 as follows:

1. I am an attorney of the State of New York and the District of Columbia and am a member of McCarter & English, LLP ("McCarter"), attorneys for Opposer Hachette Filipacchi Presse ("Hachette"). I base this Declaration upon my personal knowledge.
1. I submit this Declaration in support of Hachette's Motion to Re-open the Testimony Periods pursuant to Rule 6(b) of the Federal Rules of Civil Procedure.
2. On September 4, 2014, McCarter was retained to represent Hachette in connection with the above-referenced opposition and on that same date, McCarter filed a Notice of Appearance as counsel for Hachette in the opposition.
3. Upon our retention as counsel for Hachette in this matter, I left a voicemail message for and emailed applicant Lauren R. Schneider ("Applicant") requesting her consent to a sixty (60) day extension of all remaining trial dates in the proceeding, including the September 8th deadline for Hachette to file its trial brief. I explained that we were requesting the extension to allow our Firm time to review the file and familiarize ourselves with the facts of the

proceeding. Also, at my direction, Applicant was sent a text message to the same effect. To date, we have not received any response from Applicant to our request.

4. Immediately thereafter, in connection with preparation of Hachette's trial brief, which Hachette filed with the Board on September 8, 2014, we reviewed the docket and the materials that were made part of the record on behalf of Hachette during its testimony period.

5. Upon review of the Notice of Reliance and Notice of Filing of Testimony Deposition filed on behalf of Hachette, as well as the registrations owned by Hachette that were pleaded in the Notice of Opposition, we discovered that numerous pieces of critical evidence that we believe support Hachette's likelihood of confusion and dilution claims were not made part of the record.

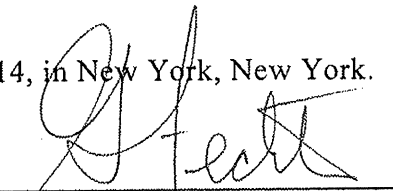
6. We have attached to Hachette's Opening Brief ("Hachette's Brief") two appendices. Appendix A to Hachette's Brief identifies a number of registrations for ELLE-formative marks that are owned by Hachette, but which were not pleaded in the Notice of Opposition or otherwise made of record. Appendix B includes certain documents produced by Applicant during discovery in this proceeding.

7. Hachette respectfully requests that the testimony periods be re-opened to permit Hachette to: (1) make the registrations included in Appendix A part of the record in this proceeding; and (2) take the steps necessary to make the documents included in Appendix B part of the record in this proceeding. Hachette further requests that the Board permit the parties to submit supplemental trial briefing addressing any additional evidence submitted during the testimony periods.

8. McCarter contacted Applicant to request her consent to re-open the testimony periods, but Applicant would not consent to this request.

I hereby declare that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Executed this 9th day of September, 2014, in New York, New York.



Gary H. Fechter